IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MARK G. MORRIS, Petitioner, vs. WASHINGTON STATE DEPARTMENT OF LICENSING, Respondent.	No. 07-2-40123-7 SEA MEMORANDUM OPINION AND ORDER DENYING RALJ APPEAL (Clerk's Action Required)

THIS MATTER is before the Court on a RALJ appeal of the final decision of the Department of Licensing Hearing Officer. The issue before the Court is whether the hearing officer erred in sustaining the Department of Licensing's suspension of appellant Mark Morris' ("Morris") driving privileges. Appellant contends that the hearing officer committed legal error in admitting the BAC results because it violated of Mr. Morris' due process rights.

I. Factual Background

On July 29, 2007, appellant Morris was arrested for suspicion of driving under the influence (DUI) by an officer of the Kirkland Police Department. Mr. Morris was taken to the Kirkland Police Department where he was informed of the implied consent rights and warnings. Morris voluntarily

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agreed to submit to a breath test. Mr. Morris submitted two (2) breath samples with readings of .103 and .103, respectively.

As a result of the breath test readings, on August 28, 2007, the Department of Licensing issued an order suspending Mr. Morris' driver's license for ninety (90) days effective September 28, 2007. At Mr. Morris' request, an administrative hearing was held on October 25, 2007. Counsel for the State and Mr. Morris presented arguments but no live testimony was taken. Counsel for Mr. Morris also filed a motion to dismiss the license suspension based, *inter alia*, on the WSP State Toxicology Lab's failure to follow protocols for simulator solution 07015. This was the batch that was used for Mr. Morris' alcohol concentration determination. On December 3, 2007, the hearing officer issued an order sustaining the Department's order of suspension and Mr. Morris has appealed the Department's order.

II. Standard of Review

The standard of review on an appeal to superior court must be limited to a determination of whether the Department has committed any errors of law. Also, the superior court shall accept factual determinations, expressly made or inferred from the final order, that are supported by substantial evidence in the record. RCW 46.20.308(9); *Lewis v. Dep't of Licensing*, 125 Wn. App. 666, 673-74, 105 P.3d 1029 (2005). In applying the substantial evidence test to review the findings of fact, the reviewing court is limited to the record below and is not to substitute its judgment for that of the trial court or to re-weigh evidence or the credibility of witnesses. *Davis v. Dep't of Labor and Industries*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Findings of fact supported by substantial evidence are treated as verities on appeal, and an appellate court will not substitute its judgment for that of the trial court, even though it may have resolved the factual dispute differently. *Doe v. Boeing Co.*, 121 Wn.2d 8, 19, 846 P.2d 531 (1993). Evidence may be substantial enough to support a finding of fact even if the evidence is conflicting and

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could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *Mairs v. Dep't of Licensing*, 70 Wn. App. 541, 545, 854 P.2d 665 (1993).

III. Statutory Basis for Admissibility of Tests for License Suspension

Pursuant to RCW 46.61.506(4)(a), a breath test performed with "any instrument approved by the state toxicologist" will be admissible at trial if the Department produces prima facie evidence of each of the following elements: (i) The person who performed the test was authorized to perform such test by the state toxicologist; (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test; (iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period; (iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade; (v) The internal standard test resulted in the message "verified"; (vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist; (vii) The simulator external standard result did lie between .072 to .088 inclusive; and (viii) All blank tests gave results of .000. Once prima facie evidence has been shown and the test results properly admitted, the subject of the test may challenge the reliability of the test. But such challenges only affect the weight to be given the results, not their admissibility. RCW 46.61.506(4)(c).

IV. The Courts of Limited Jurisdiction Suppress Test Results in Criminal Cases

This Court is well aware of the controversy surrounding evidence of malfeasance and nonfeasance at the Washington State Toxicology Lab and the resultant rulings in the various courts of

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limited jurisdiction. *See, e.g*. *State v. Ahmach, et al*., King County District Court, East Division, Case No. C00627921; *State v. Etheridge, et al.*,Skagit County District Court, Case Nos. C644658, PA1619, C4700, and C472268*; State v. Lang*, Snohomish County District Court, Cause No. C616184. In King County, a three-judge panel found a host of defalcations committed by the lab, including: false certifications; defective and erroneous procedures; software failure, human error, equipment malfunction and violation of protocols; improper evidentiary procedures; inadequate and erroneous protocols and training; and nondisclosure of machine bias. *State v. Ahmach, et al*., King County District Court, East Division, Case No. C00627921

Citing *City of Fircrest v. Jensen*, 158 Wn.2d 384 (2006), the *Ahmach* court observed that our Supreme Court in that case held that "once the prosecution had met its prima facie burden under R.C.W. 46.61.506(4), the breath test thereafter became 'admissible,' meaning the court could still serve in its role as the gatekeeper under the applicable rules of evidence." *Ahmach*, Order of Suppression, at 12. In its gatekeeper function, the district court panel noted that after the prosecution has met its prima facie burden for the admission of a BAC reading, a trial court must engage in a meaningful review of the admissibility of the BAC evidence involving, under ER 702, a two-part test. The district court recognized the application of that 2-part test as well established under Washington law:

> The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact. Part 2 of this standard should be applied by the trial court to determine if the particularities of the [scientific testing] in a given case warrant closer scrutiny. If there is a precise problem identified by the defense which would render the test unreliable, then the testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact. In other words, although the possibility of a mistake or human error in a particular case is indeed pertinent, the trial court is best suited to address these factual matters. Moreover, these concerns are not properly a part of the Frye analysis, but are within the discretion of the trial court.

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State v. Cauthron, 120 Wn.2d 879, 890 (1993). Thus, the district court panel noted that alleged infirmities in the performance of a test usually go to the weight of the evidence, not its admissibility. However,

> [i]f the testimony before the trial court shows that a given testing procedure was so flawed as to be unreliable then the results might be excluded because they are not "helpful to the trier of fact". The issue of human error in the forensic laboratory is analyzed under ER 702 and is not a part of the Frye test…..

State v. Kalakosky, 121 Wn.2d 525, 541 (1993). Nevertheless, critical to the analysis of the case before this Court, "When the challenge to admissibility is to the errors in a given test, the determination of whether expert testimony is admissible is within the discretion of the trial court." *Id.* In exercising its discretion and in serving its role as the trial court and as the gatekeeper under ER 702, the district court panel reached the conclusion that "the work product of the WSTL [Washington State Toxicology Lab] is sufficiently compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals (sic) that the WSTL simulator solution work product would not be helpful to the trier of fact." *Ahmach*, at 25.

Notably, the hearing examiner at the administrative level serves in the same role as the trial court judge in the DUI criminal prosecution: s/he is the gatekeeper to determine the admissibility of the scientific evidence under ER 702. However, a key distinction between the judge and the hearing examiner is that the hearing examiner is also always the trier of fact. This is a distinction with significance because the hearing examiner is in the best position to exercise his/her discretion in determining whether or not the WSTL simulator solution work product would be helpful to the trier of fact, i.e. the hearing examiner, based on the considerations of the compromises in the WSTL testing and the claimed unreliability of the test results.

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V. Administrative Proceedings Are Distinct From Criminal Prosecutions

Mr. Morris contends that the hearing officer's failure to exclude the BAC test results violated his due process rights by admitting and relying on evidence that Morris contends was "perjured, false, tainted by misconduct, and a reckless disregard for the truth." The suspension of a driver's license is a deprivation of a property interest that must comply with due process. *Gibson v. State Dep't of Licensing*, 54 Wn. App. 188, 194, 773 P.2d 110 (1989). Due process is a flexible concept and should be applied based on the demands of the particular situation. *Morris v. Blaker,* 118 Wn.2d 133, 144, 821 P.2d 482 (1992). At a minimum, due process requires notice and the right to be heard at a meaningful time and in a meaningful manner. *Olympic Forest Prods., Inc. v. Chaussee Corp.,* 82 Wn.2d 418, 422, 511 P.2d 1002 (1973). Courts look to three factors in determining what process is due under the circumstances: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures. *Blaker,* 118 Wn.2d at 144-45 (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The suspension and revocation hearings provided for in RCW 46.20.308 are expressly separate from the judicial action applicable to a person who is tried and convicted of DUI in court. 1983 FINAL LEGISLATIVE REPORT, 48th Wash. Leg., Reg. Sess., at 96. To expedite the suspension and revocation hearings, RCW 46.20.308(8) relaxes evidentiary rules providing that the "sworn report . . . of the law enforcement officer and any other evidence accompanying the report . . . and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation." Because this statute allows the arresting officer's report to come in as prima facie evidence that the officer had reasonable grounds to believe the driver was under the influence, officers rarely attend the administrative hearings to testify unless they are subpoenaed. It is evident that

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the legislature intended the administrative license suspension hearing to be adjudicated in a short span of time. *See* S*tate v. Vasquez*, 148 Wn.2d 303, 315, 59 P.3d 648 (2002).

Moreover, the legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. However, the statute does not mandate admissibility; it simply allows it. It still remains within the hearing officer's discretion to admit or exclude the test results under the rules of evidence. *See City of Fircrest v. Jensen*, 158 Wn.2d 384, 397 (2006). The statutory scheme set forth in RCW 46.61.506 states that drivers may still challenge the accuracy of the test or functioning of the instrument. However, once the test is admitted, those challenges only go to the weight to be accorded the test results. RCW 46.61.506(4)(c). As noted above, the hearing examiner initially sits in the role of gatekeeper under ER 702 to determine if the scientific evidence would be helpful to the trier of fact. Once the hearing examiner makes that determination and in his discretion, in this case, chooses to admit the evidence, the hearing examiner then considers and weighs the evidence as the trier of fact. The burden is then on Mr. Morris to present persuasive evidence that his breath test was inaccurate or that the breath machine was unreliable. The hearing officer in this case, who is designated as the trier of fact and in the best position to weigh the evidence, found that Mr. Morris failed to carry his burden of persuasion in showing that his specific breath test was directly compromised as a result of the problems at the State Toxicology Laboratory. *See* RCW 46.61.506(c).

This procedure complies with the due process requirements set forth in *City of Fircrest v. Jensen*, 158 Wn.2d 384, 397(2006). Mr. Morris, in this case, is afforded the identical opportunity provided to every driver in a license suspension hearing: the ability to challenge the reliability and accuracy of the BAC test results. The hearing officer did not err in admitting the BAC test results. That admissibility is determined by R.C.W 46.61.506 and the "gatekeeper's" considering the helpfulness of that evidence to the trier of fact under ER 702. Once the evidence is admitted, the hearing officer then is charged with

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weighing the evidence as presented by the State and by the driver. In this instance, the hearing officer weighed the evidence and concluded that Mr. Morris had failed to persuade him that the "taint" associated with the WSTL compromised Batch 7015 and Mr. Morris' BAC test results. As a consequence, the hearing officer's admission and consideration of the BAC test results did not violate Mr. Morris' due process rights and the hearing officer's findings that the test results accurately and reliably reflected Mr. Morris' blood alcohol content are supported by substantial evidence.

VI. Conclusion

For the foregoing reasons this Court concludes that the hearing examiner did not err in admitting the BAC test results for the petitioner driver, Mark Morris, in the license suspension hearing. Additionally, the hearing examiner's findings that Mr. Morris failed to sustain his burden of proving that the taint in his specific simulator solution rendered it unreliable is supported by substantial evidence.

Accordingly, it is hereby ORDERED that the decision of the hearing officer for the Department of Licensing is AFFIRMED and the RALJ appeal of Mr. Mark Morris is DENIED.

DATED this 18th of July, 2008.

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